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Lee Yok Swee & Son Engineering & Construction Sdn Bhd v Standard Quality Sdn Bhd & Anor

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HIGH COURT (SHAH ALAM) — SUIT NO 22–989 OF 2005
SURAYA OTHMAN J
6 DECEMBER 2010

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Contract — Breach — Damages — Quantum meruit — Plaintiff's claim for work done on project — Whether there was sufficient evidence to support claim for quantum meruit — Counterclaim for liquidated and ascertained damages — Whether damages proven

D

Evidence — Burden of proof — Whether plaintiff had proven its claims — Evidence Act 1950 s 101(1)

E

On 15 February 2003, Standard Quality Sdn Bhd ('the first defendant') appointed Lee Yok Swee & Son Engineering and Construction Sdn Bhd ('the plaintiff') as its main contractor for a project to build 295 units of terrace houses in Perak. When the plaintiff failed to complete the project within the time stipulated in the contract the first defendant terminated the contract via a termination letter dated 3 November 2004. After the termination the plaintiff

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sent out its final progress claim for the sum of RM567,833.13 ('the project claim') for the work done on the project. The plaintiff argued that it was unable to complete all the work as stipulated in the contract because the first defendant had not paid for the work done, which had resulted in the plaintiff suffering from cash flow problems. The plaintiff thus commenced the present action

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against the first defendant for RM567,833.13 on the basis of quantum meruit for work done. The defendants did not challenge the plaintiff's claim for work done or the amount due under the progress claim. The plaintiff's further claim of RM534,939.52, which was a sum to be paid to the nominated supplier ('the third party') from whom the plaintiff was required to take building materials,

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was based on a letter of demand against the plaintiff and the first defendant demanding the settlement of the said outstanding sum of RM534,939.52. The plaintiff's claim against Loh Leep Chye ('the second defendant'), the managing director of the first defendant company, was in respect of cheques amounting to RM270,500 that were allegedly issued by the first defendant to the plaintiff

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but were not banked into the plaintiff's account. Instead the plaintiff submitted that the said cheques were received by the second defendant and had been cashed by him. The first defendant contended that the certificate of non-completion showed that the plaintiff had not completed the work specified in the contract and that as such it was not entitled to the amount

claimed. As for the claim of RM270,000 against the second defendant it was submitted that there was no issue that either the first or second defendant had not made any payment to the plaintiff based on the progress made on the construction works done. Further it was submitted that the plaintiff had acknowledged receipt of the cheques issued to settle the progress claims. The first defendant also counterclaimed for the amount of RM1,508,040 as liquidated and ascertained damages ('LAD') against the plaintiff for non-completion of the project and for RM534,939.52, being the amount to be paid to the third party.

Held, allowing the plaintiff's claim in part with costs and dismissing the defendants' counterclaim with costs:

(1) The claim for quantum meruit was based on work done and not based on the fact that the whole project had been fully completed. In the instant case, the claim for quantum meruit was established on the basis that the first defendant had derived a benefit from the work done by the plaintiff and the certificate for non-compliance issued by the architect, which showed that the plaintiff had done some of the work though not all, corroborated this fact. As such, there was sufficient evidence to support the plaintiff's claim for quantum meruit and the plaintiff had to be paid a reasonable remuneration for the work done on the project (see paras 12 & 15).

(2) In the present case the plaintiff bore the burden of proving that the sum of RM534,939.52 it claimed had been deducted by the first defendant from the plaintiff's account to pay to the third party. However, by the time the trial concluded, the plaintiff only managed to prove that there was a solicitor's letter of demand from the third party against both the plaintiff and the first defendant for the sum of RM534,939.52. The plaintiff had failed to call any witness to prove and verify the amount claimed and as such this claim was not allowed (see para 18).

(3) The plaintiff had failed to prove its allegation against the second defendant. It had not led any evidence to show that the cheques were not banked into the plaintiff's account and that the second defendant was liable for the payment of the sum of RM270,500 to the plaintiff (see para 19).

(4) The first defendant's counterclaim for LAD for late delivery charges had not been proven. There was neither a letter of demand demanding this sum nor any other evidence on how the LAD was calculated, quantified or arrived at, to merit any consideration by this court. Thus this claim was not allowed (see para 21).

(5) As for the counterclaim for the sum of RM534,939.52, which was the sum to be paid to the third party, the first defendant had not proven that it was entitled to claim this sum from the plaintiff. In any case the first defendant had no locus standi to initiate this claim on behalf of the third party and this counterclaim could not stand (see para 22).

[Bahasa Malaysia summary

Pada 15 Februari 2003, Standard Quality Sdn Bhd ('defendan pertama') melantik Lee Yok Swee & Son Engineering and Construction Sdn Bhd ('plaintif') sebagai kontraktor utamanya untuk projek membina 295 unit rumah teres di Perak. Apabila plaintif gagal menyelesaikan projek tersebut dalam tempoh yang ditetapkan di dalam kontrak defendan pertama menamatkan kontrak tersebut melalui surat penamatan bertarikh 3 November 2004. Selepas penamatan plaintif menghantar tuntutan kemajuan terakhirnya untuk jumlah sebanyak RM567.833.13 ('tuntutan projek tersebut') untuk kerja yang telah dilakukan untuk projek tersebut. Plaintif menyatakan bahawa ia tidak boleh menyelesaikan kesemua kerja dalam tempoh yang dinyatakan di dalam kontrak kerana defendan pertama tidak membayar untuk kerja yang telah selesai, yang menyebabkan plaintif mengalami masalah kewangan. Plaintif oleh itu memulakan tindakan ini terhadap defendan pertama untuk RM567,833.13 berdasarkan quantum meruit untuk kerja yang telah dilakukan. Defendan-defendan tidak mencabar tuntutan plaintif untuk kerja yang telah dilakukan atau jumlah yang terhutang di bawah tuntutan perkembangan. Tuntutan lanjut plaintif untuk RM534,939.52, yang merupakan jumlah untuk dibayar kepada pembekal yang dinamakan ('pihak ketiga') yang daripadanya plaintif perlu mengambil bahan-bahan pembinaan, adalah berdasarkan kepada surat tuntutan terhadap plaintif dan defendan pertama menuntut penyelesaian jumlah yang tertunggak sebanyak RM534,939.52. Tuntutan plaintif terhadap Loh Lee Chye ('defendan kedua'), pengarah urusan syarikat defendan pertama, adalah berkaitan dengan cek-cek berjumlah RM270,500 yang didakwa dikeluarkan oleh defendan pertama kepada plaintif tetapi tidak dimasukkan ke dalam akaun plaintif. Sebaliknya plaintif menghujah bahawa cek-cek tersebut diterima oleh defendan kedua dan telah ditunaikan olehnya. Defendan pertama menghujah bahawa sijil ketidakpenyelesaian menunjukkan bahawa plaintif tidak menyelesaikan kerja seperti yang dinyatakan di dalam kontrak dan oleh itu ia tidak berhak kepada jumlah yang dituntut. Berkaitan dengan tuntutan RM270,000 terhadap defendan kedua, dihujahkan bahawa tidak ada isu bahawa sama ada defendan pertama atau kedua tidak membuat apa-apa bayaran kepada plaintif berdasarkan kepada perkembangan kerja-kerja pembinaan yang dilakukan. Selanjutnya, dihujah bahawa plaintif mengakui penerimaan cek-cek yang dikeluarkan untuk menyelesaikan tuntutan perkembangan. Defendan pertama juga menuntut balas untuk jumlah RM1,508,040 sebagai ganti rugi jumlah wang yang ditentukan ('LAD') terhadap plaintif untuk

ketidakpenyelesaian projek tersebut dan RM534,939.52, bagi jumlah untuk dibayar kepada pihak ketiga. A

Diputuskan, membenarkan sebahagian tuntutan plaintif dengan kos dan menolak tuntutan balas defendan-defendan dengan kos: B

(1) Tuntutan untuk quantum meruit adalah berdasarkan kepada kerja yang dilakukan dan bukan berdasarkan kepada fakta bahawa keseluruhan projek telah diselesaikan secara penuh. Di dalam kes ini, tuntutan untuk quantum meruit diasaskan atas dasar bahawa defendan pertama telah menerima faedah daripada kerja yang dilakukan oleh plaintif dan sijil ketidakpenyelesaian dikeluarkan oleh arkitek, yang menunjukkan bahawa plaintif telah melakukan sedikit kerja walaupun tidak lengkap, menyokong fakta ini. Oleh demikian, terdapat keterangan yang mencukupi untuk menyokong tuntutan plaintif untuk quantum meruit dan plaintif perlu dibayar gaji yang munasabah untuk kerja yang dilakukan untuk projek tersebut (lihat perenggan 12 & 15). C D

(2) Di dalam kes ini plaintif memikul beban membuktikan bahawa jumlah RM534,939.52 yang dituntutnya telah ditolak oleh defendan pertama daripada akaun plaintif untuk membayar pihak ketiga. Walau bagaimanapun, sebelum perbicaraan tamat, plaintif hanya berjaya membuktikan bahawa terdapat surat tuntutan peguamcara daripada pihak ketiga terhadap kedua-dua plaintif dan defendan pertama untuk jumlah RM534,939.52. Plaintif telah gagal memanggil mana-mana saksi untuk membuktikan dan mengesahkan jumlah yang dituntut dan oleh itu tuntutan ini tidak dibenarkan (lihat perenggan 18). E F

(3) Plaintif telah gagal membuktikan dakwaannya terhadap defendan kedua. Ia tidak mengemukakan apa-apa keterangan untuk menunjukkan bahawa cek-cek tersebut tidak dimasukkan ke akaun plaintif dan bahawa defendan kedua bertanggungjawab untuk bayaran jumlah RM270,500 kepada plaintif (lihat perenggan 19). G

(4) Tuntutan balas defendan pertama untuk LAD untuk penghantaran lewat tidak dibuktikan. Tidak ada surat tuntutan menuntut jumlah ini dan tidak ada apa-apa keterangan lain untuk menunjukkan bagaimana LAD dikira, dijumlahkan atau dicapai, untuk diberikan apa-apa pertimbangan oleh mahkamah ini. Oleh itu tuntutan ini tidak dibenarkan (lihat perenggan 21). H

(5) Berkaitan dengan tuntutan balas untuk jumlah RM534,939.52, yang bukan jumlah untuk dibayar kepada pihak ketiga, defendan pertama tidak membuktikan bahawa ia berhak untuk menuntut jumlah tersebut daripada plaintif. Walau apapun, defendan pertama tidak ada locus standi untuk memulakan tindakan ini bagi pihak ketiga dan tuntutan balas tidak boleh dipertahankan (lihat perenggan 22).] I

Notes

For cases on burden of proof generally, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 397–743.

For cases on damages, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2644–2670.

Cases referred to

Chiew Soon v Tay Tai Aun [1990] 1 CLJ 469, HC (refd)

L'Grande Development Sdn Bhd v Bukit Cerakah Development Sdn Bhd [2007] 4 MLJ 518, HC (refd)

Mohd Zaiham bin Mislan v PP [2009] 6 MLJ 737; [2010] 1 CLJ 1, CA (refd)

Neale v Richardson [1938] 1 All ER 753, CA (folld)

Poh Geok Sing v HB Enterprise Sdn Bhd [2006] 1 MLJ 617; [2006] 1 CLJ 765, CA (refd)

Public Finance Bhd v S Ramasamy KMS Chockalingam Chettiar [1990] 2 CLJ 431, HC (refd)

Standard Chartered Bank v Mukah Singh [1996] 3 MLJ 240, HC (refd)

State Government of Perak v Muniandy [1986] 1 MLJ 490, SC (refd)

Tan Hock Chan v Kho Teck Seng [1980] 1 MLJ 308; [1979] 1 LNS 110, FC (refd)

Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd [1998] 1 MLJ 713, CA (refd)

Fredrick Kong Yat Sen (SP Ng & Associates) for the plaintiff.
Ahmad Shauki bin Alizan @ Azizan (Armiy Rais) for the defendants.

Suraya Othman J:

INTRODUCTION

[1] The plaintiff's case against the first defendant is a claim for RM567,833.13 on the basis of quantum meruit for work done and a claim for RM534,939.52 which is a sum to be paid to the nominated supplier, Seri Mewah Kerjaya Sdn Bhd ('the third party'). The plaintiff's case against the second defendant who is the managing director of the first defendant company is for a sum of RM270,500 and interest thereon on judgment sum from the date of judgment until date of full realisation. By way of counterclaim, the defendant is claiming for the amount of RM1,508,040 for liquidated and ascertained damages, being late delivery charges of RM30 for every unit of houses which the plaintiff failed to complete within the stipulated time. The defendants are also claiming for the sum of RM59,866 being the sum owed by the plaintiff to the third party, Seri Mewah Kerjaya Sdn Bhd.

FACTS AND BACKGROUND

[2] The plaintiff entered into a contract with the first defendant via a letter of

award dated 15 February 2003 in which the plaintiff was appointed as the main contractor for a project to build 295 units of terrace houses at Gerik, Hulu Kinta, Perak for the price of RM7,611,000. It was agreed between the parties that construction would be divided into three parts and that the plaintiff would commence work on the first 100 units of houses. In this regard, the plaintiff proceeded with the works and was paid periodically by the first defendant. In addition, there was also an agreement or understanding that the plaintiff would get the supply of building materials from the nominated supplier appointed by the first defendant, Messrs Seri Mewah Kerjaya Sdn Bhd (the third party). The first defendant would then deduct any amount owing by the plaintiff to the third party for materials supplied to and used in the said project by the plaintiff from the plaintiff's account. Subsequently, it was argued that the plaintiff failed to complete the said project within the stipulated time and consequently the first defendant suffered losses. The first defendant terminated the contract by issuing the termination letter dated 3 November 2004 to the plaintiff.

THE PLAINTIFF'S CONTENTION

[3] The plaintiff, represented by Mr Frederick Kong Yat Sen contended that the claim for RM567,833.13 is based on quantum meruit which is a claim for work done. The figure of RM567,833.13 is derived from the claim of RM460,097.95 plus the 5% retention sum which is RM107,735.37. Mr Frederick Kong further argued that it is not the plaintiff's claim that he had completed the whole project but merely that he be paid for work done. After the termination by the first defendant via a letter dated 3 November 2004, the plaintiff sent out their final progress claim No 15 to the defendant on the 3 December 2004 and on the 1 February 2005 respectively. Mr Frederick Kong contended that all the letters and progress claims were sent to the first defendant's architect and that the first defendant did not make any payment. Mr Frederick Kong further contended that the plaintiff was unable to complete the works since the first defendant had not paid for the work done by the plaintiff resulting in the plaintiff suffering from cash flow. The defendants did not challenge the documents adduced as evidence to support the plaintiff's claim; be it for work done or amount due to the plaintiff. There were also no documents or evidence adduced by the first defendant or from the architect denying the authenticity or veracity of the plaintiff's progress claim No 15.

[4] With regard to the claim for RM534,939.52 which is the sum to be paid to the third party, Seri Mewah Kerjaya Sdn Bhd, Mr Frederick Kong contended that the defendant in his witness statement (WS-DW1) had admitted that the plaintiff is required to take building materials from Seri Mewah Kerjaya Sdn Bhd and the first defendant would pay the said company directly. However there is a solicitor's letter of demand against the plaintiff and the first defendant stating that the amount of RM534,939.52 is outstanding which meant that the

first defendant had deducted the amount of RM1,056,420.74 from the plaintiff but had failed to pay the amount of RM534,939.52 to the said third party. Therefore, it is only right and proper that the plaintiff be awarded this amount since it was deducted from the plaintiff's account.

[5] On the issue of the claim for RM270,500 against the second defendant as managing director of the first defendant's company, Mr Frederick Kong contended that a police report has been lodged alleging that the cheques issued to the plaintiff were not banked into the plaintiff's account. Mr Frederick Kong further submitted that it has been proven that none of the said cheques were banked in by the second defendant into the plaintiff's account. Mr Frederick Kong also argued that the second defendant has failed to adduce any document to contradict the plaintiff's claim. Based on the witness statement given by the plaintiff (WS-PW1), it clearly set out the plaintiff's version that the cheques were received but never banked into the plaintiff's account by the second defendant and that the second defendant had instead cashed the cheques himself. In this regard, the second defendant in his witness statement (WS-DW1) did not address on this issue at all. As such, the plaintiff's version stood unchallenged. The following cases were submitted by learned counsel to support his contention: *Standard Chartered Bank v Mukah Singh* [1996] 3 MLJ 240, *Mohd Zaiham bin Mislan v Public Prosecutor* [2009] 6 MLJ 737; [2010] 1 CLJ 1 and *State Government of Perak v Muniandy* [1986] 1 MLJ 490.

THE DEFENDANT'S CONTENTION

[6] The defendant, represented by Mr Ahmad Shauki bin Alizan @ Azizan contended that the plaintiff had breached the contract as agreed between the plaintiff and the first defendant. The plaintiff had failed to complete the construction works within the stipulated time as stated in the letter of award dated 15 February 2003. Due to the plaintiff's failure in completing the works, the first defendant had issued the termination letter dated 3 November 2004 to the plaintiff. The certificate of non-completion produced by the first defendant showed that the works were not completed (at pp 77–78 of the common bundle of document referred).

[7] As such the plaintiff is not entitled to the amount claimed. Mr Ahmad Shauki referred to the cases of *Public Finance Bhd v S Ramasamy KMS Chockalingam Chettiar* [1990] 2 CLJ 431 and *L'Grande Development Sdn Bhd v Bukit Cerakah Development Sdn Bhd* [2007] 4 MLJ 518 in support of his contention.

[8] With regard to the issue of the cheques for the amount of RM270,000, Mr Ahmad Shauki contended that the first defendant had made payments based on the progress made on the said construction and proof of the said

payments were submitted at the hearing before this court. Therefore, there is no issue that either the first defendant or the second defendant had not made any payment to the plaintiff since the said cheques have been acknowledged receipt by the plaintiff. Mr Ahmad Shauki submitted the case of *Chiew Soon v Tay Tai Aun* [1990] 1 CLJ 469 to support his contention.

THE DEFENDANT'S COUNTERCLAIM

[9] For the first defendant's counterclaim, Mr Ahmad Shauki contended that the amount claimed, RM1,508,040 is based on the calculation of RM30 per day for every unit of houses not completed as stated under item 8 of the letter of award dated 15 February 2003. The plaintiff had failed to complete the construction works within the stipulated time and the first defendant is thus entitled to claim for liquidated and ascertained damages for late delivery charges. The other claim for RM59,866 is the claim made on behalf of the third party, Messrs Seri Mewah Kerjaya Sdn Bhd which the plaintiff had failed to pay for services rendered and supplied by the third party to the plaintiff.

ISSUES TO BE TRIED

[10] The issues to be tried are:

(a) Whether the plaintiff is entitled to claim RM567,833.13 on the basis of quantum meruit.

(b) Whether the plaintiff is entitled to claim RM534,939.52 which is an amount which was supposed to be paid to the nominated supplier, Seri Mewah Sdn Bhd (the third party).

(c) Whether the plaintiff is entitled to claim RM270,500 against the second defendant.

(d) Whether the first defendant is entitled to claim liquidated and ascertained damages against the plaintiff for non-completion of the project.

(e) Whether the first defendant is entitled to claim RM59,866 on behalf of the nominated supplier, Seri Mewah Sdn Bhd (the third party).

DECISION OF THE COURT

[11] Upon considering the evidence and submissions by both parties, I ruled in favour of the plaintiff and allowed the claim for RM567,833.13 on the basis of quantum meruit for work done. However, I dismissed the plaintiff's claim for RM534,939.52 which is an amount due to be paid to the third party, Seri Mewah Kerjaya Sdn Bhd for the supply of building materials to the plaintiff. I

also dismissed the plaintiff's claim for a sum of RM270,500 against the second defendant. As for the defendant's counterclaim, I also made an order that the same be dismissed. I shall now give my reasons for so ordering.

[12] In my view, the evidence established before the court indicates that the plaintiff had commenced on the first 100 units of houses under the said project and after the termination by the first defendant, the plaintiff sent out their final progress claim No 15 (p 23 in common bundle of documents) to the first defendant on the 3 December 2004 and on the 1 February 2005 respectively. It is evident that the architect had issued a certification of non-completion wherein a detailed report was also written stating that the plaintiff had not fully completed the works (at pp 79–91 of common bundle of documents). I also agree with the defendant's submission that the claim for quantum meruit is based on work done and not based on the fact that the whole project has been fully completed. This principle has been affirmed by the Court of Appeal in the case of *Poh Geok Sing v HB Enterprise Sdn Bhd* [2006] 1 MLJ 617; [2006] 1 CLJ 765. In this case, Gopal Sri Ram JCA held that:

> With regard to the claim on a quantum meruit, the general rule is that if a contract is an entire one the plaintiff cannot sue until the work has been completed (*Cutter v Powell* 6 TR 320). One of the exceptions to this general rule is where, the special contract being unperformed, a new contract has been implied from the conduct of the parties to pay remuneration commensurate with the benefit derived from partial performance.

[13] Here, I would like to refer to the case of *Tan Hock Chan v Kho Teck Seng* [1980] 1 MLJ 308; [1979] 1 LNS 110. In this case the respondent was employed by the appellant to build six units of shop houses. The respondent only completed five units of the shop houses. The remaining unit was not completed because of the claim by the ground tenant. Accordingly, the claim for quantum meruit was allowed by the Federal Court.

[14] I am also in agreement with the decision made in the case of *Neale v Richardson* [1938] 1 All ER 753 where it was held that the refusal by the architect to issue a certificate or the absence of a certificate was no bar to the plaintiff's right to recover the balance of the money due for work done.

[15] In this instant case, the progress claim by the plaintiff depends on the certification by the architect. The certificate of non-completion showed that the plaintiff had indeed done some works though the works were not fully completed. A claim on quantum meruit is therefore established on the basis that the first defendant had derived a benefit from the work done by the plaintiff. As such, a reasonable remuneration has to be paid to the plaintiff. Here, I found that there were sufficient evidence to support the plaintiff's claim

for quantum meruit. On the balance of probabilities, I am very much inclined to find in favour of the plaintiff in coming to the conclusion that the plaintiff has completed the works as stipulated in the progress claim No 15. The certificate for non-completion issued by the architect also corroborated this fact. The defendant in his evidence did not challenge this fact

[16] In the case of *Standard Chartered Bank v Mukah Singh* [1996] 3 MLJ 240, it was held that when a defendant had failed to argue that the amount claimed by the plaintiff was incorrect prior to his testimony in court and then in court, he contradicted himself and produced no document as support, the evidence from the plaintiff would be taken as the amount owed by the defendant.

[17] In the case of *Mohd Zaiham Mislan v Public Prosecutor* [2010] 1 CLJ 1, the Federal Court held that 'It is an accepted principle of law that failure by the accused to cross-examine the prosecution's witness on a crucial part of the case will amount to an acceptance of the witness's testimony'. Therefore based on the above cases, and the facts before me, the claim for RM567,833.13 on the basis of quantum meruit is proven and consequently allowed.

[18] As regard to the claim for RM534,939.52 against the first defendant, the burden of proof is always on the plaintiff to prove his case. Judgment in his favour is dependent on the existence of facts which he asserts. He must prove those facts exist. In this present case, the plaintiff must prove that the sum of RM534,939.52 had been deducted by the first defendant from the plaintiff's account to pay to the third party Messrs Seri Mewah Kerjaya Sdn Bhd for the building materials supplied and used in the said project. By the time the trial concluded, the plaintiff only managed to prove that there is a solicitor's letter of demand from the third party against both the plaintiff and first defendant stating that the amount of RM534,939.52 is outstanding. However the plaintiff had not proven that it is entitled to claim the said sum as the plaintiff failed to call any witness from Messrs Seri Mewah Kerjaya Sdn Bhd to prove and verify the amount claimed. As such this claim is not allowed.

[19] For the claim of RM270,500 against the second defendant, on the totality of the evidence adduced before me, I find that the plaintiff has failed to prove the allegation against the second defendant. The plaintiff has not led any evidence to show that the said cheques were not banked into the plaintiff's account and that the second defendant is liable for the payment of the said sum to the plaintiff.

[20] In this regard, I am guided by the case of *Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd* [1998] 1 MLJ 713, where the court held:

Under s 101(1) of the Evidence Act 1950, whoever desires the court to give judgment as to any legal right or liability, dependant on the existence of facts which he asserts, must prove that those facts exists. In other words, the plaintiff must prove such facts as the plaintiff desires the court to give judgment as to its right to claim against the defendant or the defendant's liability to pay the plaintiff. The burden of proof is on the plaintiff: s 101(2). In order to succeed here, the plaintiff must prove its claim affirmatively.

THE DEFENDANT'S COUNTERCLAIM

[21] As for the defendant's counterclaim, learned counsel for the plaintiff rightly submitted that there is no evidence to support such a claim. The first defendant's counterclaim for the sum of RM1,508,040 being for liquidated and ascertained damages for late delivery charges has not been proven. There is no letter of demand shown to this court from the first defendant to the plaintiff demanding this sum. Further, there was no evidence, documentary or otherwise adduced on whether the first defendant did appoint another contractor to take over the project, when the project was completed or how the liquidated and ascertained damages was calculated, quantified or arrived at. In short there was a dearth of evidence to merit any consideration by this court. Therefore this claim is not allowed.

[22] With regard to the second defendant's counterclaim for the sum of RM534,939.52 which is alleged to be paid to Seri Mewah Kerjaya Sdn Bhd, the defendants had not proven that it is entitled to claim from the plaintiff the said sum. Furthermore, it is a well established fact that there was never a claim made by the first defendant for this sum before this trial, that is, the first defendant never issued any letter of demand against the plaintiff for the said sum. In this regard, I am also in agreement with the plaintiff's submission that the first defendant has no locus standi to initiate a claim on behalf of the third party, Seri Mewah Kerjaya Sdn Bhd. This is not an insurance subrogation claim and in any case subrogation was never pleaded by the first defendant. It is trite law that parties are bound by their pleadings and cannot raise any evidence not pleaded: *State Government of Perak v Muniandy* [1986] 1 MLJ 490. As such, this counterclaim cannot stand and is hereby dismissed.

[23] The plaintiff's claim for RM567,833.13 is allowed with costs.

[24] The plaintiff's claim for RM534,939.52 and RM270,500 are not allowed.

[25] The defendant's counterclaim is dismissed with costs.

Plaintiff's claim for allowed in part with costs and the defendants' counterclaim dismissed with costs.

Reported by Kohila Nesan